

PART 4

PROCEDURES FOR SEPARATION

A. Scope

1. The supplementary procedures in this part are applicable only when required under a specific reason for separation in part 1. These procedures are subject to the requirements set forth in part 1 with respect to specific reasons for separation.

2. When a servicemember is processed on the basis of multiple reasons for separation, the following guidelines apply to procedural requirements (including procedural limitations on characterization of service or description of separation):

a. The requirements for each reason will be applied to the extent practicable.

b. If a reason for separation set forth in the notice of proposed action requires processing under the Administrative Board Procedure (section C), the entire matter shall be processed under section C.

c. If more than one reason for separation is approved, the guidance on characterization that provides the greatest latitude may be applied.

d. When there is any other clear conflict between a specific requirement applicable to one reason and a general requirement applicable to another reason, the specific requirement shall be applied.

e. If a conflict in procedures cannot be resolved on the basis of the foregoing principles, the procedure most favorable to the respondent shall be used.

B. Notification Procedure

1. Notice. If the Notification Procedure is initiated under part 1, the respondent shall be notified in writing of the matter set forth in this section.

a. The basis of the proposed separation, including the circumstances upon which the action is based and a reference to the applicable provisions of this instruction.

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b. Whether the proposed separation could result in discharge, release from active duty to a reserve component, transfer from the Selected Reserve to the IRR, release from custody or control of the naval service, or other form of separation.

c. The least favorable characterization of service or description of separation authorized for the proposed separation.

d. The right to obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation. Classified documents may be summarized.

e. The respondent's right to submit statements.

f. The respondent's right to consult with counsel qualified under article 27(b)(1) of the UCMJ (reference (d)), (except when nonlawyer counsel may be appointed under subsection B4 of this part).

g. If the respondent has 6 or more years of total active and reserve military service, the right to request an Administrative Board.

h. If eligible for an Administrative Board, the respondent's right to representation at the Administrative Board either by military counsel appointed by the convening authority or by military counsel of the respondent's own choice under subsection B4.

i. If eligible for an Administrative Board, the right to representation at the Administrative Board by civilian counsel at the respondent's own expense.

j. The right to waive the rights in subsections B1d through i., after being afforded a reasonable opportunity to consult with counsel, and that failure to respond shall constitute a waiver of the rights in subsection B1d through i.

k. Failure to appear without good cause at a hearing constitutes waiver of the right to be present at the hearing.

2. Additional Notice Requirements

a. If separation processing is initiated on the basis of more than one reason under part 1, the requirements of subsection B1a, apply to all proposed reasons for separation.

b. If the respondent is in civil confinement, absent without leave, or in a reserve component not on active duty or upon transfer to the IRR, the relevant notification procedures in parts 7, 8, and 9 apply.

c. In those cases that may be subject to a reimbursement requirement for recoupment of advance education assistance costs, bonuses, or special pays, the respondent must be advised of such requirement prior to submitting a request for voluntary separation or making a decision on an involuntary separation resulting from alleged misconduct. (Failure to provide such advisement, however, shall not constitute grounds for avoiding a reimbursement requirement unless otherwise expressly provided by law or superior regulation.)

d. If the servicemember is Fleet Reserve/retired list eligible and has refused to request transfer to the Fleet Reserve/retired list under subsection A2e of part 2, the member's notification letter shall include a statement reflecting such refusal and acknowledging the servicemember's understanding that if separation is approved, he or she may lose all retainer/retired pay and benefits.

e. Additional notification requirements are set forth in section D of part 1, when characterization of service as General (under honorable conditions) is authorized and the servicemember is processed for separation by reason of Disability.

3. Response. The respondent shall be provided a reasonable period of time, but not less than 2 working days, to act on the notice. An extension may be granted upon a timely showing of good cause by the respondent. The decision of the respondent on each of the rights set forth in subsections B1d through i, and applicable provisions referenced in subsection B2, shall be recorded and signed by the respondent and counsel subject to the following limitations:

a. If notice by mail is authorized under parts 7, 8 or 9 and the respondent fails to acknowledge receipt, submit a timely reply, or if the respondent is absent without authority and fails to return to military control by the date specified in the notice, that fact shall constitute a waiver of rights and an appropriate notation shall be recorded on a retained copy of the appropriate form.

b. If the respondent declines to respond as to the selection of rights, such declination shall constitute a waiver of rights and an appropriate notation will be made on the form provided for respondent's reply. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate form, the selection of rights will be noted and an appropriate notation as to the failure to sign will be made.

4. Counsel

a. A respondent has the right to consult with qualified counsel when the Notification Procedure is initiated, except under the following circumstances:

(1) The respondent is away from or deployed outside the United States or away from its overseas home port, or to a shore activity remote from Judge Advocate resources;

(2) no qualified counsel is assigned and present at the vessel, unit, or activity;

(3) the commanding officer does not anticipate having access to qualified counsel from another vessel, unit, or activity, for at least the next 5 days; and

(4) the commanding officer determines that the needs of the naval service require processing before qualified counsel will be available.

b. Nonlawyer counsel shall be appointed whenever qualified counsel is not available under subsection B4a. Any appointed nonlawyer counsel shall be a commissioned officer with no prior involvement in the circumstances leading to the basis of the proposed separation, and no involvement in the separation process itself. The nonlawyer counsel shall be encouraged to seek advice by telephone or other means from any judge advocate on any legal issue relevant to the case whenever practicable. When a nonlawyer counsel is appointed, the appointing letter shall state that qualified counsel is unavailable for the applicable reason in subsection B4a, and that the needs of the naval service warrant processing before qualified counsel will be available; a copy of the appointing letter will be attached to each copy of the written notice of separation proceedings.

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c. The respondent may also consult with a civilian counsel at the respondent's own expense. The respondent's use of a civilian counsel does not eliminate the requirement to furnish counsel in subsections B4a or B4b. Consultation with civilian counsel shall not delay orderly processing in accordance with this instruction.

C. Administrative Board Procedure

1. Notice. If an Administrative Board is required, the respondent shall be notified in writing of the matters in this section.

a. The basis of the proposed separation, including the circumstances upon which the action is based and reference to the applicable provisions of this instruction.

b. Whether the proposed separation could result in discharge, release from active duty to a Reserve component, transfer from the Selected Reserve to the IRA, release from the custody or control of the naval service, or other form of separation.

c. The least favorable characterization of service or description of separation authorized for the proposed separation.

d. The right to obtain copies of documents that will be forwarded to the separation authority supporting the basis of the proposed separation. Classified documents may be summarized.

e. The respondent's right to submit statements to the administrative board or the separation authority in lieu of a hearing.

f. The respondent's right to consult with counsel as prescribed in section B1f of this part. However, nonlawyer counsel may not represent a respondent before an Administrative Board unless (1) the respondent expressly declines appointment of counsel qualified under article 27(b)(1) of the UCMJ (reference (d)) and requests a specific nonlawyer counsel; or (2) the separation authority assigns nonlawyer counsel as assistant counsel.

g. The respondent's right to request a hearing before an Administrative Board.

h. The respondent's right to representation at the Administrative Board either by military counsel appointed by the convening authority or by military counsel of the respondent's own choice under subsection C14.

i. The right to representation at the Administrative Board by civilian counsel at the respondent's own expense.

j. The right to waive the rights in subsections C1d through i, after being afforded a reasonable opportunity to consult with counsel, and that failure to respond shall constitute a waiver of the rights in subsection C1d through i.

k. Failure to appear, without good cause at a hearing constitutes waiver of the right to be present at the hearing.

2. Additional Notice Requirements

a. If separation processing is initiated on the basis of more than one reason under part 1, the requirements of subsection C1a apply to all proposed reasons for separation.

b. If the respondent is in civil confinement, absent without leave, or in a reserve component not on active duty or upon transfer to the IRA, the relevant notification procedures in parts 7, 8, or 9 apply.

c. In those cases that may be subject to a reimbursement requirement for recoupment of advance education assistance costs, bonuses, or special pays, the respondent must be advised of such requirement prior to submitting a request for voluntary separation or making a decision on an involuntary separation resulting from alleged misconduct. (Failure to provide such advisement, however, shall not constitute grounds for avoiding a reimbursement requirement unless otherwise expressly provided by law or superior regulation.)

d. If the servicemember is Fleet Reserve/retired list eligible and has refused to request transfer to the Fleet Reserve/retired list under subsection A2e of part 2, the servicemember's notification letter shall include a statement reflecting such refusal and acknowledging the servicemember's understanding that if separation is approved, he or she may lose all retainer/retired pay and benefits.

3. Response. The respondent shall be provided a reasonable period of time, but not less than 2 working days, to act on the notice. An extension may be granted upon a timely showing of good cause by the respondent. The decision of the respondent on each of the rights set forth in subsections C1d through i, and applicable provisions referenced in subsection C2, shall be recorded and signed by the respondent and counsel, subject to the following limitations:

a. If notice by mail is authorized under parts 7, 8 or 9 and the respondent fails to acknowledge receipt, submit a timely reply, or if the respondent is absent without authority and fails to return to military control by the date specified in the notice, that fact shall constitute a waiver of rights and an appropriate notation shall be recorded on a retained copy of the appropriate form.

b. If the respondent declines to respond as to the selection of rights, such declination shall constitute a waiver of rights and an appropriate notation will be made on the form provided for respondent's reply. If the respondent indicates that one or more of the rights will be exercised, but declines to sign the appropriate form, the selection of rights will be noted and an appropriate notation as to the failure to sign will be made.

4. Counsel

a. A respondent has the right to consult with counsel, as prescribed in subsection B4 of this part, prior to electing or waiving any of his or her rights under subsections C1d through i.

b. If an administrative board is elected, the respondent shall be assigned a counsel qualified under article 27(b)(1) of the UCMJ (reference (d)). Navy and Marine Corps Judge Advocates may be detailed by their commanding officer, officer in charge, or by his or her designee. When permissible, nonlawyer counsel may be detailed by the convening authority. The respondent has the right to be represented before an administrative board by qualified individual military counsel of the respondent's own choice, if that counsel is reasonable available, as follows.

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(1) The respondent may request a qualified counsel who is assigned duties as defense counsel at the servicing command. The determination of reasonable availability is within the sole discretion of the requested counsel's detailing authority, and that decision is final.

(2) Unless otherwise directed, appointment of a qualified counsel of respondent's own choice relieves the previously assigned counsel. If respondent so requests in writing and if the interest of fair procedure so required, the detailing authority may continue the previously assigned counsel in representing respondent. Approval is within the sole discretion of the detailing authority and that decision is final.

c. The respondent may also consult with a civilian counsel and may be represented at the Administrative Board by that counsel, all at the respondent's own expense. The respondent's use of a civilian counsel does not eliminate the requirement to furnish counsel in subsections C4a or C4b. Consultation with civilian counsel shall not delay orderly processing in accordance with this instruction.

d. Nonlawyer counsel may represent a respondent before an Administrative Board if:

(1) The respondent expressly declines appointment of qualified counsel and requests a specific nonlawyer counsel; or

(2) The separation authority assigns nonlawyer counsel as assistant counsel.

D. Conditional Waiver

1. A respondent entitled to an Administrative Board may request a conditional waiver after a reasonable opportunity to consult with counsel under subsection C1d. A conditional waiver is a statement initiated by a respondent waiving the right to Board proceedings contingent upon receiving a characterization of service or description of separation higher than the least favorable characterization or description authorized for the basis of separation set forth in the notice to the respondent.

2. When a respondent requests a conditional waiver, the commanding officer shall forward a copy of the notice, the conditional waiver, and a recommendation to the separation authority (see part 6) for action. The separation authority may either grant the waiver or deny it if it is inconsistent with the guidance set forth in part 2.

E. Actions of the Commanding Officer

1. Forward to the convening authority a copy of the notice required in subsection B1 or C1 of this part.

2. If required by the Chief of Naval Operations or the Commandant of the Marine Corps, forward to the convening authority recommendations, with specific supporting rationale, on the Board's findings and recommendations, with respect to:

a. Specific reasons for separation as set forth in part 1;

b. Retention, separation or suspension of separation; and

c. Characterization of service or description of separation following the guidance in part 3. If the Board recommends a characterized separation, the commanding officer may not recommend a less favorable characterization. If the Board recommends an uncharacterized Entry Level Separation, the commanding officer may recommend a characterized separation, with supporting justification, only if it meets the requirements of subsection C1 of part 3.

F. Actions of the Convening Authority

1. Appoint an Administrative Board as described in subsection A1 of part 5.

2. Make provisions for respondent's counsel as appropriate.

3. Make provisions for witnesses as appropriate.

4. Rule finally on all challenges for cause of legal advisors, when appointed, and of Board members when a legal advisor has not been appointed.

5. Forward to the separation authority the findings and recommendations of the Board, the record of the Board's proceedings, and the recommendation of the commanding officer, if any.

6. Make a recommendation with specific rationale, to the separation authority on each of the Board's findings and recommendations if the commanding officer is not so required.